SUPREME COURT, U. S

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-700

THOMAS A. MOTTO, JR., Petitioner

versus

THE GENERAL SERVICES ADMINISTRATION OF THE UNITED STATES OF AMERICA; ROBERT HAMPTON; JAMES E. JOHNSON; and L. J. ANDOLSEK, Individually and as Chairman and Members of the United States Civil Service Commission, and ROBERT L. KUNZIG, Individually and as Administrator of THE GENERAL SERVICES ADMINISTRATION OF THE UNITED STATES, Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

No.

THOMAS A. MOTTO, JR., Petitioner

versus

THE GENERAL SERVICES ADMINISTRATION OF THE UNITED STATES OF AMERICA; ROBERT HAMPTON; JAMES E. JOHNSON; and L. J. ANDOLSEK, Individually and as Chairman and Members of the United States Civil Service Commission, and ROBERT L. KUNZIG, Individually and as Administrator of THE GENERAL SERVICES ADMINISTRATION OF THE UNITED STATES, Respondents

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, Thomas A. Motto, Jr., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on October 2, 1974.

OPINION BELOW

The judgment of the Court of Appeals for the Fifth Circuit, not reported, appears in the Appendix hereto. This judgment, without written opinion, was a summary affirmance of the decision rendered by the District Court

for the Eastern District of Louisiana. The original judgment of the District Court reported in 335 F. Supp. 694, was rendered on February 7, 1972 and ordered petitioner to be reinstated and paid back pay. Petitioner and The General Services Administration of the United States of America disagreed over the meaning of the back pay order, and on November 13, 1973, petitioner brought a motion to clarify the District Court's judgment. This motion was denied, in an unreported opinion, on January 21, 1974. The decision of the Court of Appeals affirmed the denial of the motion to clarify judgment; this petition seeks review of the affirmance of that denial.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on October 2, 1974. This petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1), 62 Stat. 928.

QUESTIONS PRESENTED

1. Whether The Back Pay Act, 5 U.S.C. §5596, 81 Stat. 201, requires that a wrongfully discharged employee of a federal agency, who has been reinstated by court order, be paid a lump sum payment for the annual leave which he would have accumulated had he not been wrongfully discharged.

2. Whether The Back Pay Act prohibits the United States from deducting from the back pay due to a reinstated civil service employee, the amount of the lump sum payment made to him at the time of his wrongful discharge.

STATUTORY PROVISIONS INVOLVED

1. United States Code, Title 5, §5596:

"(a) For the purpose of this section, 'agency' means--

(1) an Executive agency;
(2) the Administrative Office of the United States Courts;
(3) the Library of Congress;
(4) the Government Printing Office; and
(5) the government of the District of Columbia.

(b) An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowance, or differentials of the employee--

(1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during that period; and

(2) for all purposes, is deemed to have performed service for the agency during that period, except that the employee may not be credited, under this section, leave in an amount that would cause the amount of leave to his credit to exceed the maximum amount of the leave authorized for

the employee by law or regulation. (c) The Civil Service Commission shall prescribe regulations to carry out this section. However, the regulations are not applicable to the Tennessee Valley Authority and its employees. Added Pub. L. 90-83, §1 (34)(C), Sept. 11, 1967, 81 Stat. 201.

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b.	Act of August 26, 1950; 64 Stat. 476, then referred to as 5 U.S.C. §22-1	23
c.	5 U.S.C. §6304, recently amended by P.L. 93-181, 87 Stat. 705	26
d.	Public Law 93-181, 87 Stat. 705	30

STATEMENT OF THE CASE

On February 12, 1967, Thomas A. Motto, Jr., petitioner, was wrongfully discharged from his Civil Service job by The General Services Administration of the United States of America. At the time of his wrongful discharge, Mr. Motto was paid, among other things, $950.40 as a lump sum payment for the 240 hours of leave that he had accumulated as of that date.

Suit was initiated on behalf of Mr. Motto in the District Court for the Eastern District of Louisiana on July 31, 1970. The jurisdiction of the District Court was based on 28

U.S.C. §1346 and 28 U.S.C. §1391. On February 7, 1972, the District Court rendered judgment ordering Mr. Motto reinstated and further ordering that he be paid back wages for the period he was wrongfully discharged, less amounts he earned from other employments during this period. 335 F.Supp. 694. The judgment did not mention lump sum leave payments. The particular facts relating to this petition and the judgment of the District Court are set forth in the District Court's opinion and a stipulation of the parties entered into on March 5, 1974.[1/]

Petitioner was reinstated to employment with The General Services Administration of the United States of America, pursuant to judgment of the District Court, on June 18, 1972. Upon reinstatement, the $950.40 originally paid Mr. Motto as compensation for his accumulated leave was deducted from the award rendered by the District Court, and petitioner was recredited with 240 hours of accumulated leave, plus the annual leave accumulated during the then current year. Mr. Motto was not paid for, nor credited with, any additional leave at the time of his reinstatement.

Petitioner and the General Services Administration disagreed over petitioner's right to leave payments, and on November 13, 1973, petitioner brought a motion to clarify the judgment of the District Court.[2/] This

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1/ The judgment and stipulation are printed in the Appendix, beginning at pages 4 and 14 respectively.

2/ The Motion to Clarify the Judgment is found in the Appendix at page 16.

motion contended that Mr. Motto should be compensated monetarily for the leave that he would have accrued had he not been wrongfully discharged. Alternatively, the motion contended that Mr. Motto should be allowed to retain the $950.40 paid him at the time of his wrongful discharge and that the 240 hours of accumulated leave with which he was recredited should be charged against the leave which he would have accrued and accumulated during the four years he was kept from his employment. The motion to clarify the judgment was denied on January 21, 1974. On March 15, 1974, appeal was taken to the United States Court of Appeals for the Fifth Circuit and on October 2, 1974, the Court of Appeals, summarily affirmed the decision of the District Court denying the Motion to Clarify the Judgment.[3/] A motion to stay issuance of the mandate for thirty (30) days was granted by the Court of Appeals on October 29, 1974.

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with THE BACK PAY ACT, 5 U.S.C. §5596, 81 Stat. 201.

a) The Back Pay Act requires that a wrongfully discharged employee of a federal agency, who has been reinstated by administrative determination or court order, be paid a lump sum payment for the annual leave which he would have accumulated had he not been wrongfully discharged.

3/ The judgment of the United States Court of Appeals for the Fifth Circuit is found in the Appendix at page 1, 2.

The basic statutory provision setting forth the compensation to be given a wrongfully discharged employee of a federal agency is 5 U.S.C. §5596, 81 Stat. 201, the Back Pay Act. The provision provides as follows:

"(a) For the purpose of this section, 'agency' means--

(1) an Executive agency;

(2) the Administrative Office of the United States Court;

(3) the Library of Congress;

(4) the Government Printing Office; and

(5) the government of the District of Columbia.

(b) An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee--

(1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during that period; and

(2) for all purposes, is deemed to have performed service for the agency during that period, except that the employee may not be credited, under this section, leave in an amount that would cause the amount of leave to his credit

> to exceed the maximum amount of the leave authorized for the employee by law or regulation.
>
> (c) The Civil Service Commission shall prescribe regulations to carry out this section. However, the regulations are not applicable to the Tennessee Valley Authority and its employees." Added Pub.L. 90-83, §1(34)(C), Sept. 11, 1967, 81 Stat. 201.

This act does not specifically mention payment for leave; however, a careful review of the legislative and jurisprudential history of this enactment clearly demonstrates the right of a wrongfully discharged employee to be compensated for the annual leave that he would have accumulated had he not been wrongfully discharged. Several Court of Claims cases have denied a reinstated employee compensation for annual leave. Ainsworth v. U.S., Ct. Cl. 1968, 399 F.2d 176; Zeiger v. U.S., Ct. Cl. 1961, 295 F.2d 915, and others. This Court has never passed on the right of a wrongfully discharged employee to be paid for such leave. For this reason it is submitted that this Court should grant this petition and render a definitive ruling on the question.

The present Back Pay Act was a reenactment and liberalization of several previous acts. It was promulgated with the clearly established purposes of consolidating into one enactment all of the prior laws dealing with this subject, making the benefits similar for the various classes of employees affected, and liberalizing existing law governing the restoration of an employee to his position. The law was in no way designed to restrict the recovery which an employee might then have; rather it was to give all employees the most liberal recovery then allowed under

any one of the statutes. It is this act that governs Mr. Motto's right to be compensated for his lost leave.

The history of the various antecedent Back Pay Acts is determinative of the intent of the present act.

The initial federal enactment allowing an employee, reinstated because his suspension or removal was unwarranted or unjustified, the right to be compensated for this improper removal was the Lloyd-Lafollette Act of 1912; as amended in 1948, 62 Stat. 354, then 5 U.S.C. §652, it provided in pertinent part as follows:

> "Any person removed or suspended without pay *** who *** is reinstated or restored to duty on the ground that such removal or suspension was unjustified or unwarranted, shall be paid compensation at the rate received, on the date of such removal or suspension for the period for which he received no compensation with respect to the position from which he was removed, or suspended, less any amounts earned by him through other employment during such period, and shall for all purposes except the accumulation of leave be deemed to have rendered service during such period." (See Appendix page 20 for complete Act).

This provision, hereafter referred to as the "1948 Act", expressly provided that the reinstated employee is deemed to have rendered services during such period of unwarranted discharge for all purposes except the accumulation of leave.

In Leverette v. United States, 142 F. Supp. 955, Ct. of Cl. (1956), the Court of

Claims had occasion to interpret the 1948 Act. The Court properly held that the claimant was not entitled to the paid for leave which he would have accumulated while wrongfully kept from his job, holding "an employee wrongfully removed as the result of a reduction in force and subsequently restored 'shall for all purposes except the accumulation of leave' be deemed to have rendered service during the period of separation." It was noted that the same statute which provided for the restoration of plaintiff to his former position also specifically removed any rights that he may have to the annual leave that he would have accrued but for his wrongful discharge.

It is submitted that this limitation regarding leave accumulation has been eliminated from the applicable federal enactments.

Congress began modification of the limiting concepts found in the "1948 Act" with the passage of the Act of August 26, 1950, 64 Stat. 476, then referred to as 5 U.S.C. 22-1, hereafter referred to as the "1950 Act". This enactment related to employees who were reinstated after having been removed from their positions for national security reasons. The relevant parts of this act provided as follows:

> "*** any person whose employment is so suspended or terminated under the authority of said sections *** may, in the discretion of the agency head concerned, be reinstated or restored to duty, and if so reinstated or restored shall be allowed compensation for all or any part of the period of such suspension or termination in an amount not to exceed the difference between the amount such person

> would normally have earned during the period of such suspension or termination, at the rate he was receiving on the date of suspension or termination, as appropriate, and the interim net earnings of such person: ***." (See Appendix page 23 for complete Act).

Significantly, this act made no mention either of accumulated leave or of payment therefor or of repayment for leave previously accumulated. In Vitarelli v. U.S., 279 F.2d 878, Ct. of Cl. (1960), the Court of Claims squarely held that a discharged employee reinstated under the 1950 Act was entitled to the monetary equivalent of the leave which he would have accrued. The court stated as follows:

> "As to accrual of annual leave, the Act of August 26, 1950, is silent; that is, it is not prohibited, as it is under the 1948 Amendment to the Lloyd-La Follette Act. In Hynning v. United States, 1958, 141 Ct. Cl. 486 a plaintiff who had been removed and reinstated under the same statute as this plaintiff was permitted to recover both for the annual leave he would have accrued during the period of his removal as well as for 48 hours earned at the time of his removal, but not accrued due to the 30-day limit on such accruals. The court recognized that it could not require the defendant to credit the reinstated employee with any more than the 30 days permitted by 5 U.S.C.A. §2062(c). Nevertheless, it felt compelled to presume that he would have taken his annual leave rather than have forfeited it had

> he not been prevented from taking any leave as result of the acts of the defendant. The court, therefore, granted plaintiff the monetary equivalent of the leave which would have accrued. It indicated, also, that it did not believe the limitation on accruable leave was intended by Congress to apply to persons separated under the circumstances of that case and, we might add, under the circumstances of this one, too. The reasoning of the Hynning case has been relied on by us in the past as it is now." Vitarelli v. U.S., 279 F. 2d 878, Ct. of Cl. (1960).

As noted in the above excerpt, the court recognized that the reinstated employee could not be credited with greater than 30 days or 240 hours of accrued leave, 5 U.S.C. §6304, recently amended by P.L. 93-181, 87 Stat. 705. However, the court felt compelled to presume that the employee would have taken his annual leave rather than have forfeited it; therefore, the plaintiff was granted the monetary equivalent of the leave which he would have accrued.

Other cases supporting the Vitarelli court's reasoning are Hynning v. U.S., 141 Ct. Cl. 468 (1958); Prosterman v. U.S., 144 Ct. Cl. 691 (1959); McGuire v. U.S., Ct. Cl. No. 38354, decided February 11, 1959.

The cases relied on by the District Court are Ainsworth v. U.S., Ct. Cl., 399 F.2d 176 (1968) and Zeiger v. U.S., Ct. Cl., 295 F.2d 915 (1961). Ainsworth primarily was decided on the precedent of Zeiger.

It is submitted that Zeiger was an erroneous decision under the 1950 Act. This decision

held that the reinstated employee was not entitled to be paid for lost leave. It is submitted that this decision is erroneous.

The Zeiger court reached its conclusion notwithstanding a vigorous dissent by retired Supreme Court Justice Reed sitting by designation. Justice Reed, in dissent, noted that the 1950 Act differed markedly from the 1948 Act which had specifically excluded reimbursement for accrued annual leave from the award to be given a reinstated employee. He further observed that this change gained increased significance because the variance had been specifically called to the attention of the committees in charge of the bill. Based on the significance of this modification, Justice Reed was of the opinion the phrase "the amount such person would normally have earned during the period of suspension or termination" referred not only to salary but additionally to the monetary value of his annual leave.

b) Recent federal enactments evidence an affirmation of the concept of distinguishing between crediting annual leave and being compensated for annual leave.

The concept of giving monetary value for accrued annual leave is well recognized by the legislation of the United States. 5 U.S.C. §5551, 80 Stat. 488, 138. In no other way can a wrongfully discharged employee be made whole except by the reimbursement of his lost salary and the monetary equivalent of his lost annual leave.

The Veterans Preference Act, 58 Stat. 387, as amended from time to time, also requires back pay awards, at least as interpreted by the Comptroller General, 39 Comp. Gen. 639; however, this provision pertains

to improper demotions, and leave provisions are not involved.

In 1966, the Back Pay Act, 5 U.S.C. §5596, 81 Stat. 201, was enacted with the apparent intent of further liberalizing existing law governing the restoration of a wrongfully discharged employee to his former position. The only words of limitation found in this enactment is the provision stating that "the employee may not be credited, under this section, leave in an amount that would cause the amount of leave to his credit to exceed the maximum amount of leave authorized for the employee by law or regulation."4/ The obvious intent of this provision was to prevent a returning employee from going on extended leave at full pay immediately upon his return to Government service. This section does not prevent, nor even allude to, the payment to an employee for accumulated leave not used.

The only case that has interpreted the 1966 Act, regarding this issue, is Ainsworth v. U.S., 399 F.2d 176, Ct. of Cl. (1968). In Ainsworth, the court, relying on the Zeiger decision, held that the reinstated employee was not eligible to be paid for the back leave that he would have accumulated had he not been wrongfully discharged. The Ainsworth decision

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4/ 5 U.S.C. §6304 provides that employees may carry forward from one year to the other, not more than 30 days or 240 hours of accumulated leave. This carry forward is determined as of January 1 of each year. See Appendix, page 26 for complete text.

was based on Zeiger which had erroneously interpreted the 1950 Act. Zeiger, apparently, misplaced reliance on the Lorexette case which had properly interpreted the 1948 Act. As noted in dissent by Justice Reed, the Zeiger court failed to denote the significance of the modifications made to the 1948 Act. These modifications were carried forward, with even greater benefits to reinstated employees, in the Back Pay Act of 1966. By improperly relying on Zeiger, Ainsworth fails to distinguish a distinct trend of Federal legislation liberalizing benefits to reinstated employees. Counsel submits that the decisions rendered in Zeiger and Ainsworth are in error and should be corrected by this court.

Significantly, the legislative history and intent of the 1966 Act, as traced in the U. S. Congressional and Administrative News Vol. 2 at page 2099, provides "In addition, leave accumulation, excluded specifically from the back pay provision of Section 6 of the Act of August 24, 1912, (the 1948 Act) is authorized uniformly in accordance with the precedent of the most recent Act of August 25, 1950." The precedent of the 1950 Act is that of Hynning, supra, and Vitarelli, supra, which specifically requires that a reinstated employee be paid for leave not used or credited.

The Congressional liberalization of leave benefits has not ceased with the 1966 Act; Congress has recently enacted and the President has signed a bill, Public Law 93-181, 87 Stat. 705, (See Appendix page 30), increasing federal employees' use of annual leave. The new law allows federal employees to be paid for the unused leave they earn during the leave year of their departure from government. In amending 5 U.S.C. §6303(b) the enactment also provides that annual leave lost through administrative error, exigencies

of public business or illness can be credited beyond the present maximum accumulation and carried into the next leave year. In cases of lost leave through administrative error, reinstitution will be made to June 1960. Leave restored under these conditions is placed in a separate leave account and if still available shall be included in the lump sum payments under 5 U.S.C. §5551 or §5552(1).

Certainly if leave lost through administrative error or sickness of the employee is to be regained, then clearly leave lost because of wrongful discharge should be restored.

Public Law 93-181 further demonstrates the Congressional view of liberalizing employee benefits. As previously shown, this enactment, under certain conditions, allows accumulation of leave in excess of the maximum amount permitted by law and even allows payment for this accrued leave.

Petitioner submits that the legislative history of 5 U.S.C. §5596 demonstrates a Congressional desire of increasing leave benefits given reinstated employees. In Ainsworth v. United States, the court, with misplaced reliance on Zieger v. U.S., failed to recognize this legislative precedent. Petitioner strongly urges that this petition be granted and that Ainsworth be reversed by a holding that Thomas A. Motto, Jr., be compensated for the annual leave he would have accrued had he been in government service during the time between his illegal discharge and his reinstatement.

c) The Back Pay Act prohibits the United States from deducting from the back pay due to a reinstated civil service employee, the amount of the lump sum payment made to him at the time of his wrongful discharge.

At the time of petitioner's wrongful discharge he was paid $950.40 for 240 accumulated hours leave accrued as of that date. Upon reinstatement, the $950.40 originally paid Mr. Motto was deducted from the award rendered by the District Court, and petitioner was recredited with 240 hours accumulated leave plus the annual leave accumulated during the then current year.

Petitioner contends that he should, at least, be allowed to retain the $950.40 originally paid him and that he should be further credited with 240 hours of lost accumulated leave plus the annual leave he would have acquired during the then current year. The 240 hours of lost leave with which petitioner should be credited should be offset against the 1,112 hours of leave he would have accumulated had he not been wrongfully kept fromhis employment and not against leave for which he was previously paid.

In Ainsworth, the Court of Claims, relying on Leverette, refused plaintiff the right to retain the lump sum payment for accrued leave given him at the time of his discharge. Leverette had correctly interpreted the 1948 Act which had prohibited a reinstated employee from being credited for leave that he would have accrued had he not been discharged. The 1950 Act, and 1966 Act, made no such limitations; therefore, wrongfully discharged employees have been allowed to accrue leave, up to the maximum of 240 hours, during the period of their wrongful discharge, Zeiger v. U.S., supra. Petitioner should not be penalized because at the time of his discharge he had accumulated 240 hours of accrued leave. For these reasons the Ainsworth court was erroneous and should be reversed.

In summary, at the time of petitioner's discharge he was fully compensated for all leave accrued as of that date. During the period of this wrongful discharge, he again began to accrue leave, by the time of his reinstatement he would have accrued 139 days or 1,112 hours of annual leave. Clearly, Mr. Motto should at least be allowed to retain the $950.40 originally paid him and in addition thereto he should be granted 240 hours leave as a credit against the 1,112 hours he would have accumulated had he not been wrongfully discharged.

2. The decision below raises significant and recurring problems concerning the compensation to be awarded wrongfully discharged federal employees.

Petitioner submits that the Congressional enactments regulating the back pay and other compensation to be awarded wrongfully discharged federal employees, who have been reinstated by administrative or court order, show a clear intent on the part of Congress to liberalize the benefits to be given these reinstated employees. The lower courts have frustrated this Congressional desire by refusing to denote and fully implement the applicable statutes, i.e., the "1950 Act"[5/] and The Back Pay Act, 5 U.S.C. §5596, 81 Stat. 201.

In Zeiger v. U.S., 295 F.2d 915, Ct. of Cl. (1961), the Court of Claims, notwithstanding a vigorous dissent on the part of former

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5/ The "1950 Act", Act of August 26, 1950, 64 Stat. 476, is found at Appendix, page 23.

Justice Reed, reversed a line of cases[6/] which had interpreted the "1950 Act" so as to require that a reinstated federal employee be compensated for annual leave he would have accrued had he not been wrongfully discharged. In Ainsworth v. U.S., 399 F.2d 176, Ct. of Cl. (1968), the court relying on Zeiger gave The Back Pay Act, 5 U.S.C. §5596, 81 Stat. 201, a restrictive interpretation so as to preclude a reinstated employee from receiving monetary compensation for the leave he would have accrued had he not been wrongfully discharged.

Petitioner submits that this interpretation frustrates a clear desire of Congress to liberalize the benefits to be given reinstated federal employees. Petitioner believes that this petition should be granted in order to have the Supreme Court of the United States render a definitive opinion on this critical question.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully Submitted:

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Thomas A. Motto, Jr.

6/ Vitarelli v. U.S., 279 F.2d 878, Ct. of Cl. (1960); Hynning v. U.S., 141 Ct. Cl. 468 (1958); and Prosterman v. U.S., 144 Ct. Cl. 691 (1959).

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 74-1763
Summary Calendar*

THOMAS A. MOTTO, JR.,

Plaintiff-Appellant,

versus

GENERAL SERVICES ADMINISTRATION OF THE UNITED STATES OF AMERICA, ET AL.,

Defendants-Appellees

- - - - -

Appeal from the United States District Court for the Eastern District of Louisiana

- - - - -

(October 2, 1974)

Before WISDOM, GOLDBERG and GEE, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1/]

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*Rule 18, 5 Cir., Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F. 2d 409, Part I.

1/ See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F. 2d 966.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1973

No. 74-1763
Summary Calendar

D.C. Docket No. CA 70-1865 "C"

THOMAS A. MOTTO, JR.,

Plaintiff-Appellant,

versus

GENERAL SERVICES ADMINISTRATION OF THE UNITED STATES OF AMERICA, et al.,

Defendants-Appellees

Appeal from the United States District Court for the Eastern District of Louisiana

Before WISDOM, GOLDBERG and GEE, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that

the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiff-appellant pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

October 2, 1974

Issued as Mandate:

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NUMBER 70-1865
(HEADING OMITTED)

JUDGMENT

The Court having filed its written opinion herein, in lieu of formal findings of fact and conclusions of law, directing the entry of judgment in favor of the plaintiff and against the defendants, it is

ADJUDGED as follows:

I.

That the plaintiff Thomas A. Motto, Jr. recover of the defendants, The General Services Administration of the United States of America; Robert Hampton; James F. Johnson; and L. J. Andolsek, Individually and as Chairman and Members of the United States Civil Service Commission, and Robert L. Kunzig, Individually and as Administrator of The General Services Administration of the United States, the sum of Five Thousand Six Hundred Five and 74/100 Dollars ($5,605.74) (representing the pay, including stautory pay adjustments and periodic step increases, the plaintiff would have received in the normal course of his employment with The General Services Administration of the United States of America from February 12, 1967 to the approximate time of institution of this suit (July 31, 1970) after deducting therefrom the amounts he received during that period from other employment and as United States Government retirement benefits) plus interest of four percent (4%) per annum

thereon from the date of entry of this judgment until payment of all sums due the plaintiff pursuant to this judgment, and the costs of this action;

II.

That the plaintiff Thomas A. Motto, Jr. further recover of the said defendants the sum of Two Thousand Seven Hundred Ninety-Eight and 79/100 Dollars ($2,798.79) (representing the pay, including statutory pay adjustments and periodic step increases, the plaintiff would have received in the normal course of his employment with The General Services Administration of the United States of America from the approximate time of institution of this suit (July 31, 1970) to December 31, 1971, after deducting therefrom the amounts he received during that period from other employment and as United States Government retirement benefits) plus interest of four percent(4%) per annum thereon from the date of entry of this judgment until payment of all sums due the plaintiff pursuant to this judgment, and the costs of this action;

III.

That the plaintiff Thomas A. Motto, Jr. further recover of the said defendants the amounts to which he would similarly be entitled with respect to the period from January 1, 1972 until the date of final payment by the defendants of all sums due the plaintiff pursuant to this judgment, plus interest at the rate of four percent (4%) per annum from the date of entry of this judgment until payment of all sums due the plaintiff pursuant to this judgment; and

IV.

That the plaintiff Thomas A. Motto, Jr. be reinstated to employment with The General Services Administration of the United States of America, with all rights and benefits that have accrued thereto and derived therefrom since the date of his involuntary resignation, including, but not limited to, seniority, retirement rights, back pay as set forth in paragraph I, II, and III hereof, and the promotion to Traffic Manager, GS-9 (with appropriate step increases) GSA-FSS, Supply Distribution Division, Export Control Branch, at the Naval Support Activity, New Orleans, Louisiana, which promotion the record shows the plaintiff would have received had he not been forced to resign from his employment.

JUDGMENT READ, RENDERED and SIGNED at New Orleans, Louisiana, this 7th day of February, 1972.

/s/ Alvin B. Rubin
JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NUMBER 70-1865
(HEADING OMITTED)

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

Thomas A. Motto, Jr. had been employed in New Orleans by The General Services Administration for nine years when he was notified he was transferred to Fort Worth. Rather than accept the transfer, he resigned. He contends that his transfer was an adverse action, and that he was entitled to notice and a hearing. His transfer without a hearing, he contends, forced him out of government service, and he seeks reinstatement, with back pay, and other benefits that he lost when he resigned. The United States contends that Motto's transfer was to meet the needs of his employer, and did not constitute adverse action entitling him to a hearing.

It is unnecessary to plumb the depths of all the issues tendered by the parties. While the evidence was contradictory, I find the facts to be as follows:

Motto was a Civil Service employee. He had served in World War II and the Korean War and was entitled to the protection of the Veterans Preference Act, 5 U.S.C.A. §§2108, 3501 et seq. See also 5 U.S.C.A. §§3307 et seq. and 5 U.S.C.A. §7511. His performance evaluation sheets indicate that his work had always been considered average or above average.

Whether Mr. Motto was a supervisor, as

he contends, or merely a working job leader, as contended by GSA, several people were under his supervision in New Orleans. There had been a degree of turnover in his staff that his superior considered excessive and there had been some complaints about his supervisory ability. In the latter part of 1966, his supervisor was alerted to an approaching inspection of the New Orleans and Ft. Worth offices. He therefore came from Ft. Worth to inspect the New Orleans office himself, to attempt to make certain that the offices would obtain satisfactory reports.

Because of dissatisfaction with Motto's services, Motto's supervisor decided to get rid of Motto. If he attempted to discharge Motto because of inadequate performance, Motto would be entitled to a hearing, and the evidence was not sufficient to indicate that the charges would succeed. But Motto's supervisor knew that he had twice before refused transfers from New Orleans. While some of Motto's personal circumstances had changed in the interim, his superior knew that Motto would likely again decline a transfer unless he were offered a concurrent increase in pay. Therefore, the supervisor decided to order a transfer to Ft. Worth, without a pay increase.

Motto's supervisor conferred with personnell officers about how to achieve his goals. They prepared a draft of a letter stating that Motto was being transferred because of "your inability to supervise people" and because of "your excessively high rate of turnover." (Motto Ex. 13).

But a transfer on these grounds might create a factual issue concerning Motto's supervisory ability and also might be considered adverse action. On the other hand,

a transfer for "operational reasons" could not be questioned. Therefore, Motto was ordered to move to Ft. Worth because of job requirements.

As expected, Motto decided he would not accept the transfer. He was informed that he could instead resign, and he did.

In fact, Motto's services were needed in New Orleans, not in Ft. Worth, at the time his transfer was ordered. Indeed, his supervisor's own report, dated December 12, 1966, indicated that he then foresaw the need for an additional employee in New Orleans. While he testified that the work load in New Orleans was not increasing, or indeed, was declining, the report he requested from the Federal Supply Service, the agency that supplied the work being done by GSA's office, indicated that their work load had increased substantially and was then expected to remain at the higher level indefinitely.

As soon as Motto resigned, a new employee was hired in Ft. Worth supposedly to replace him. But, while Motto was classified GS 8, the new employee was classified GS 9. Explanations are found for this: the new employee had special qualifications, he was hired three months later, he had been a GS 10 and took a reduction to come to Ft. Worth.

But nothing in all of this rationalization explains why Mr. Motto could not have been offered the new position. In fact, it is possible, although the evidence is not clear, that the new employee had been interviewed and was under consideration when Motto was presented with his dilemma by his supervisor. GSA correspondence shows that the new employee was "hired to fill the vacancy...

created by the retirement" of Motto, and this letter is dated March 24, 1967 only eight weeks after Motto resigned.

Nor is the superior able to explain why Motto was not afforded the benefit of the administrative policy, "Employees who are moved from one geographical location to another. . .will be given promotions to the maximum extent possible, subject to the availability of vacancies and pursuant to manpower requirements." Administrative Procedure Manual, Chp. 2-39 p.30 (ADM P1000. 2A Chge 11) April 7, 1970. There is no satisfactory explanation why Motto's subordinate in New Orleans was promoted to GS 7 in July, 1967, a few months after it was apparently learned that there was less need for that office. Indeed in March, 1967 it was recommended in an investigation of the New Orleans office that the permanent position formerly held by Motto and then in Ft. Worth by the employee hired to replace him be returned to the New Orleans office. While this was never done, it does create substantial doubt about the supposed need to transfer Motto's job to Texas.

Motto contends his transfer was an adverse action, 5 U.S.C.A. §7512, entailing an elimination of supervisory status, hence a reduction in rank, and he was entitled to written notice and a hearing. 5 U.S.C.A. §5712(b). Whether or not he was a supervisor, Motto's transfer was ordered because he was considered an undesirable employee, and to induce his resignation. Hence it was an adverse action even if it entailed no reduction in rank. Cf. Kletschka v. Driver, 2 Cir.1969, 411 F. 2d 436, at 444-45.

This is not a case where a genuine

operational need of an agency required the agency to give an employee a job that he considered inherently unpleasant.

> "The fact that the employee may be faced with an inherently unpleasant situation, or that his choice may be limited to two unpleasant alternatives, does not, per se, make the resulting action an involuntary action."

Federal Personnel Manual, 762-1, p.25. Here Motto's supervisor devised the "inherently unpleasant situation" as a way to get rid of Motto.

Unlike the situation in Paroczay v. Hodges, D.C.D.C. 219 F. Supp. 89, rev'd, D.C. Cir. 1961, 297 F.2d 439, an immediate resignation was not demanded. But, as the court said in a footnote to that decision, the ultimate issue is whether the resignation was in fact coerced. Id. at 441.

A discretionary decision by an administrative official authorized to make the decision should not be overturned by the courts unless that decision was arbitrary or capricious. Hoppe v. The United States, 1956, 136 Ct. Cl. 559, See Kletschka v. Driver, 2 Cir. 1969, 411 F.2d 436. And an employee may be given a fair choice between facing charges or resigning. Rich v. Mitchell, Ct. of App. D of C. 1959, 273 F. 2d 78. But if it is shown that a decision was made to rid the government of an employee without complying with the statute, the action may not be camouflaged as a discretionary decision to relocate the place where a function is performed. Transfer, like other government action affecting an employee's status, may not be based on "an aribtrary decision to achieve a

predetermined result." Bright v. Macy, D. Maryland, 1967, 278 F. Supp. 215 220.

GSA would read the issues narrowly. But the statute, the regulations, and the federal administrative policies are not mere cant. They reflect a national policy designed to protect government employees from arbitrary action. To those who work for the largest employer in the free world these policies afford a fundamental protection against the caprice or tyranny of a supervisor who might otherwise control the events of an employee's life. Hence, government procedures may not be manipulated by using literal compliance to achieve a prohibited result.

If Motto was an unsatisfactory employee, he should have been faced with the charge that he was, and given an opportunity to defend himself. If his transfer was to discipline him for improper work performance, he should have been notified of the reasons for it and afforded a hearing.

> "It was to guard against the danger of arbitrary treatment of personnel, without a fair opportunity being given the employee to refute whatever charges have been levied against him, that Congress guaranteed the right to a hearing before any disciplinary action could be taken. If this salutary procedural safeguard can be evaded merely by ordering a transfer, with no reasons being given for such action, then § 4110 would mean very little indeed. Disciplinary action by any name requires for its legitimization a full hearing under § 4110." Kletschka v. Driver, 2d Cir. 1969, 411 F. 2d 436, 446.

Here as there, Motto would have been "entitled to introduce proof establishing that his transfer falls within the disciplinary classification, and if he can so prove, he is entitled to appropriate declaratory and injunctive relief." Id. There is no reason why GSA, or any government agency, should be required to provide lifelong employment on his own terms to an employee who does not do a satisfactory job, either because of his work results or his personality. But neither should any supervisory be permitted to make his own subjective determination that an employee is undesirable, and set out to achieve that person's separation from service by a calculated series of actions designed to force his resignation.

For these reasons, judgment will be rendered in favor of the plaintiff. Plaintiff's counsel will prepare a form of judgment, and submit it to opposing counsel for review. If there is any objection to the proposed form of judgment that the parties cannot reconcile, their difference will be submitted to the court.

This opinion serves in lieu of formal findings of fact and conclusions of law.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NUMBER 70-1865
(HEADING OMITTED)

STIPULATION OF FACTS

It is hereby stipulated by and between the parties in the above entitled action, through their respective counsel of record, that:

I.

The employment of Thomas A. Motto, Jr., by The General Services Administration of the United States of America was initially terminated on February 12, 1967.

2.

Upon discharge, Thomas A. Motto, Jr. was paid $950.40 for accumulated leave of 240 hours as of February 12, 1967.

3.

Thomas A. Motto, Jr. was reinstated to employment with The General Services Administration of the United States of America on June 18, 1972.

4.

Upon reinstatement, the $950.40 paid Thomas A. Motto, Jr. for 240 hours accumulated leave during the current year on February 12, 1967 was deducted from the award rendered by the District Court, and Thomas A. Motto, Jr. was recredited with 240 hours of accumulated

leave, plus the annual leave accrued during the then current year.

5.

Thomas A. Motto, Jr. was not paid for, nor credited with, any additional annual leave at the time of his reinstatement.

It is further stipulated by and between the parties in the above entitled action, through their respective counsel of record, that this stipulation may be filed with the Clerk of the United States District Court, Eastern District of Louisiana and made a part of the record in this proceeding.

Dated: March 15, 1974.

/s/ Neal D. Hobson
Milling, Benson,
Woodward, Hillyer &
Pierson

/s/ Leonard P. Avery
Assistant United
State Attorney

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NUMBER 70-1865
(HEADING OMITTED)

WRITTEN REASONS FOR DENIAL OF MOTION TO CLARIFY JUDGMENT

Plaintiff asks for a "clarification" of the form of judgment to which he and the defendant agreed, ordering the government to pay him for the annual leave he would have accrued had he been in government service during the time between his illegal discharge and his reinstatement. If the alternative, he asks that the government be compelled to pay him $950.40, the amount the government deducted from the award because it had been paid to the plaintiff, in lieu of leave time, on his separation from government service.

The issue must be resolved by an interpretation of the applicable statute, for the plaintiff's rights are founded solely on it. The statute presently in force, 5 U.S.C. §5596, is a slightly amended version of the 1966 Back Pay Act, Pub. L. 89-380, 80 Stat. 95, (the "1966 Act") and it clearly governs this action, since the plaintiff was wrongfully discharged in 1967. Indeed, Ainsworth v. U.S., Ct. Cl. 1968, 399 F. 2d 176, holds that the 1966 Act governs even if separation was before 1966, so long as reinstatement comes after the Act's passage.

The Act provides, in section (b), that a reinstated employee is entitled to the back pay and allowances "that the employee normally would have earned during that period..." and that he is deemed to have been an employee

during separation for all purposed "except that the employee may not be credited, under this section, leave in an amount that would cause the amount of leave to his credit to exceed the maximum amount of the leave authorized for the employee by law or regulation." Plaintiff, the parties agree, is entitled to accumulate a maximum of 250 hours,plus time accumulated in the current year. Even if the statute had never been construed before, I cannot read it as implying that, though a maximum is placed on accrual of leave, an employee is entitled to be paid for leave time that he may not accrue. Indeed the statute appears to imply precisely the reverse: with respect to leave there will be no benefits in excess of 240 hours accrued leave time.

The statute has been construed before, and so have its predecessors. Although plaintiff looks to this statutory and judicial history to support his argument, he looks in vain.

The Act of August 28, 1950, 64 Stat. 476 (the "1950 Act"), dealt with the reinstatement of employees discharged for national security reasons; it was one of the several acts that the 1966 Act was meant to consolidate and simplify. This act, however, did not provide for either accrual or pay for leave time: in fact, it made no mention at all of accumulated leave time.

Plaintiff also looks to another predecessor of the Back Pay Act, The Lloyd Lafollette Act of 1912, as amended in 1948, 62 Stat. 354; which provides that a reinstated employee "shall for all purposes except the accumulation of leave [be] deemed to have rendered service during" the period of separation.

Using the cases that both parties view as the principal decisions under these statutes, it is easy enough to trace the judicial interpretation of them. In Leverette v. U.S., Ct. Cl. 1956, 142 F. Supp. 955, the Court read the 1948 Act to rule out payments for annual leave that would have accrued if the plaintiff had not been fired; it required the plaintiff to pay back the lump sum he had been paid in lieu of leave when he was discharged.

Early decisions under the 1950 Act reached a contrary result since this Act was silent on the subject of annual leave. See, e.g. Hynning v. U.S., 1958, 141 Ct. Cl. 468; Vitarelli v. U.S., Ct. Cl. 1960, 279 F. 2d 878. Zeiger v. U.S., Ct. Cl. 1961, 295 F. 2d 915, expressly overruled these earlier cases, however, and held that a reinstated employee could not recover for annual leave passed during separation.

In Ainsworth v. U.S., Ct. Cl. 1968, 399 F. 2d 176, the Court interpreted the 1966 Act to rule out annual leave payments upon reinstatement. The law in this area--regardless of the specific statute involved-- therefore would seem to be relatively settled. But plaintiff advances a rather ingenious argument. He argues that Zeiger is wrong and the earlier cases under the 1950 Act are right; here he has some distinguished company, since Mr. Justice Reed dissented in Zeiger. If Zeiger is wrong, he argues, then an employee wrongfully discharged continues to accumulate leave time during separation, for which he may demand credit or pay. The 1966 Act rules out only the credit option and is silent on the subject of pay; therefore, plaintiff concludes, he may demand pay for the leave time he would have accumulated had

he not been discharged.

Ingenious as it is, plaintiff's argument has some fatal flaws. To succeed, plaintiff must show that, under the various statutes and the case law, the pay and credit options have been viewed as separable--otherwise, the 1966 Act forecloses the pay option by expressly limiting the credit option. There is simply no evidence that these two alternatives are separable. In fact, there is every reason to suppose that they are tied, and that a statute expressly limiting credit for accumulated leave implicitly limits pay for it. The 1950 Act was silent on the subject, and the early cases (overruled by Zeiger) simply allowed pay. Ainsworth read the 1966 Act to prevent pay because it expressly limited credit for accumulated leave. The statutes have treated pay and credit for accumulated leave as two sides of the same coin; a statute that deals with one implicitly deals with the other. The courts have properly adhered to this symbiosis in their application of the statutes. This result is the only one that, in light of the statutory language and scheme, make sense.

Though on occasion precedent must yield to logic and reason, this is not such a case. Leverette, Ainsworth and even Zeiger appear to have been correctly decided, and this court will follow them. Plaintiff's motion to clarify the judgment is DENIED.

Dated: January 17, 1974.

/s/ Alvin B. Rubin
JUDGE

Lloyd-Lafollette Act as Amended in 1948; 62 Stat. 354. §652 Removal without pay from classified civil service.

No person in the classified civil service of the United States shall be removed or suspended without pay therefrom except for such cause as will promote the efficiency of such service and for reasons given in writing. Any person whose removal or suspension without pay is sought shall (1) have notice of the same and of any charges preferred against him; (2) be furnished with a copy of such charges; (3) be allowed a reasonable time for filing a written answer to such charges,with affidavits; and (4) be furnished at the earliest practicable date with a written decision on such answer. No examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer or employee directing the removal or suspension without pay. Copies of the charges, the notice of hearing, the answer, the reasons for removal or suspension without pay, and the order of removal or suspension without pay shall be made a part of the records of the proper department or agency, as shall also the reasons for reduction in grade or compensation; and copies of the same shall be furnished, upon request, to the person affected and to the Civil Service Commission. This subsection shall apply to a person within the purview of section 863 of this title, only if he so elects.

(b) Reinstatement or restoration to duty; compensation; deduction; veterans; removal by reduction in force.

(1) Any person removed or suspended without pay under subsection (a) of this section who, after filing a written answer to

the charges as provided under such subsection or after any further appeal to proper authority after receipt of an adverse decision on the answer, is reinstated or restored to duty on the ground that such removal or suspension was unjustified or unwarranted, shall be paid compensation at the rate received on the date of such removal or suspension, for the period for which he received no compensation with respect to the position from which he was removed or suspended, less any amounts earned by him through other employment during such period, and shall for all purposes except the accumulation of leave be deemed to have rendered service during such period. A decision with respect to any appeal to proper authority under this paragraph shall be made at the earliest practicable date.

(2) Any person who is discharged, suspended, or furloughed without pay, under section 863 of this title, who, after answering the reasons advanced for such discharge, suspension, or furlough or after an appeal to the Civil Service Commission, as provided under such section, is reinstated or restored to duty on the ground that such discharge, suspension, or furlough was unjustified or unwarranted, shall be paid compensation at the rate received on the date of such discharge, suspension, or furlough for the period for which he received no compensation with respect to the position from which he was discharged, suspended, or furloughed, less any amounts earned by him through other employment during such period, and shall for all purposes except the accumulation of leave be deemed to have rendered service during such period.

(3) Any person removed or suspended

without pay in a reduction in force who, after an appeal to proper authority, is reinstated or restored to duty on the ground that such removal or suspension was unjustified or unwarranted shall be paid compensation at the rate received on the date of such removal or suspension, for the period for which he received no compensation with respect to the position from which he was removed or suspended, less any amounts earned by him through other employment during such period, and shall for all purposes except the accumulation of leave be deemed to have rendered service during such period. A decision with respect to any appeal to proper authority under this paragraph shall be made at the earliest practicable date.

(c) Membership in associations, clubs, etc., no cause for reduction in rank or compensation or removal.

Membership in any society, association, club, or other form of organization of postal employees not affiliated with any outside organization imposing an obligation or duty upon them to engage in any strike, or proposing to assist them in any strike, against the United States, having for its objects, among other things, improvements in the condition of labor of its members, including hours of labor and compensation therefor and leave of absence, by any person or groups of persons in said postal service, or the presenting by any such person or groups of persons of any grievance or grievances to the Congress or any Member thereof shall not constitute or be cause for reduction in rank or compensation or removal of such person or groups of persons from said service.

(d) Right to petition Congress.

The right of persons employed in the civil service of the United States, either individually or collectively, to petition Congress, or a Member thereof, or to furnish information to either House of Congress, or to any committee or member thereof, shall not be denied or interfered with. (Aug. 24, 1912, ch. 389, §6,37 Stat. 555; June 10, 1948, ch. 447, 62 Stat. 354.)

Act of August 26, 1950; 64 Stat. 476, then referred to as 5 U.S.C. §22-1.

To protect the national security of the United States by permitting the summary suspension of employment of civilian officers and employees of various departments and agencies of the Government, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, notwithstanding the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555), as amended (5 U.S.C. 652), or the provisions of any other law, the Secretary of State; Secretary of Commerce; Attorney General; the Secretary of Defense; the Secretary of the Army; the Secretary of the Navy; the Secretary of the Air Force; the Secretary of the Treasury; Atomic Energy Commission; the Chairman, National Security Resources Board; or the Director, National Advisory Committee for Aeronautics, may, in his absolute discretion and when deemed necessary in the interest of national security, suspend,without pay, any civilian officer or employee of the Department of State (including the Foreign Service of the United States), Department of Commerce, Department of Justice, Department of Defense, Department of the Army, Department of the Navy, Department of the Air Force,

Coast Guard, Atomic Energy Commission, National Security Resources Board, or National Advisory Committee for Aeronautics, respectively, or of their several field services: Provided, That to the extent that such agency head determines that the interests of the national security permit, the employee concerned shall be notified of the reasons for his suspension and within thirty days after such notification any such person shall have an opportunity to submit any statements or affidavits to the official designed by the head of the agency concerned to show why he should be reinstated or restored to duty. The agency head concerned may, following such investigation and review as he deems necessary, terminate the employment of such suspended civilian officer or employee whenever he shall determine such termination necessary or advisable in the interest of the national security of the United States, and such determination by the agency head concerned shall be conclusive and final: Provided further, That any employee having a permanent or indefinite appointment, and having completed his probationary or trial period, who is a citizen of the United States whose employment is suspended under the authority of this Act, shall be given after his suspension and before his employment is terminated under the authority of this Act, (1) a written statement within thirty days after his suspension of the charges against him, which shall be subject to amendment within thirty days thereafter and which shall be stated as specifically as security considerations permit; (2) an opportunity within thirty days thereafter (plus an additional thirty days if the charges are amended) to answer such charges and to submit affidavits; (3) a hearing, at the employee's request, by a duly constituted agency authority for this purpose; (4) a review of his case by the agency head, or some official designated by him, before a decision adverse

to the employee is made final; and (5) a written statement of the decision of the agency head:

Provided further, That any person whose employment is so suspended or terminated under the authority of this Act may, in the discretion of the agency head concerned, be reinstated or restored to duty, and if so reinstated or restored shall be allowed compensation for all or any part of the period of such suspension or termination in an amount not to exceed the difference between the amount such person would normally have earned during the period of such suspension or termination, as appropriate, and the interim net earnings of such person: Provided further, That the termination of employment herein provided shall not affect the right of such officer or employee to seek or accept employment in any other department or agency of the Government: Provided further, That the head of any department or agency considering the appointment of any person whose employment has been terminated under the provisions of this Act may make such appointment only after consultation with the Civil Service Commission, which agency shall have the authority at the written request of either the head of such agency or such employee to determine whether any such person is eligible for employment by any other agency or department of the Government.

Sec. 2. Nothing herein contained shall impair the powers vested in the Atomic Energy Commission by the Atomic Energy Act of 1946 or the requirements of section 12 of that Act that adequate provision be made for administrative review of any determination to dismiss any employee of said Commission.

Sec. 3. The provisions of this Act shall apply to such other departments and agencies

of the Government as the President may, from time to time, deem necessary in the best interests of national security. If any departments or agencies are included by the President, he shall so report to the Committees on the Armed Services of the Congress.

Sec. 4. Section 3 of the Act of December 17, 1942 (56 Stat. 1053), and section 104 of the Act of July 20, 1949 (Public Law 179, Eighty-first Congress), and section 630 of the Act of October 29, 1949 (Public Law 434, Eighty-first Congress), are hereby repealed. August 26, 1950.

5 U.S.C. §6304, recently amended by P.L. 93-181, 87 Stat. 705.

(a) Except as provided by subsections (b), (d), and (e) of this section annual leave provided by section 6303 of this title, which is not used by an employee, accumulates for use in succeeding years until it totals not more than 30 days at the beginning of the first full biweekly pay period, or corresponding period for an employee who is not paid on the basis of biweekly pay periods, occurring in a year.

(b) Annual leave not used by an employee of the Government of the United States in one of the following classes of employees stationed outside the United States accumulates for use in succeeding years until it totals not more than 45 days at the beginning of the first full biweekly pay period, or corresponding period for an employee who is not paid on the basis of biweekly pay periods, occurring in a year:

(1) Individuals directly recruited or transferred by the Government of the United States from the United States or its territories or possessions including the Commonwealth of Puerto Rico for employment outside

the area of recruitment or from which transferred.

(2) Individuals employed locally but --

(A) (i) who were originally recruited from the United States or its territories or possessions including the Commonwealth of Puerto Rico but outside the area of employment;

(ii) who have been in substantially continuous employment by other agencies of the United States, United States firms, interests, or organizations, international organizations in which the United States participates, or foreign governments; and

(iii) whose conditions of employment provide for their return transportation to the United States or its territories or possessions including the Commonwealth of Puerto Rico; or

(B) (i) who were at the time of employment temporarily absent, for the purpose of travel or formal study, from the United States, or from their respective places of residence in its territories or possessions including the Commonwealth of Puerto Rico; and

(ii) who, during the temporary absence, have maintained residence in the United States or its territories or possessions including the Commonwealth of Puerto Rico but outside the area of employment.

(3) Individuals who are not normally residents of the area concerned and who are discharged from service in the armed forces to accept employment with an agency of the Government of the United States.

(c) Annual leave in excess of the amount allowable --

(1) under subsection (a) or (b) of this section which was accumulated under earlier statute; or

(2) under subsection (a) of this section which was accumulated under subsection (b) of this section by an employee who becomes subject to subsection (a) of this section; remains to the credit of the employee until used. The excess annual leave is reduced at the beginning of the first full biweekly pay period, or corresponding period for an employee who is not paid on the basis of biweekly pay periods, occurring in a year, by the amount of annual leave the employee used during the preceding year in excess of the amount which accrued during that year, until the employee's accumulated leave does not exceed the amount allowed under subsection (a) or (b) of this section, as appropriate. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 519.

(d) (1) Annual leave which is lost by operation of this section because of --

(A) administrative error when the error causes a loss of annual leave otherwise accruable after June 30, 1960;

(B) exigencies of the public business when the annual leave was scheduled in advance; or

(C) sickness of the employee when the annual leave was scheduled in advance; shall be restored to the employee.

(2) Annual leave restored under paragraph (1) of this subsection, or under clause (2) of section 5562 (a) of this title, which is in excess of the maximum leave accumulation

permitted by law shall be credited to a separate leave account for the employee and shall be available for use by the employee within the time limits prescribed by regulations of the Civil Service Commission. Leave credited under this paragraph but unused and still available to the employee under the regulations prescribed by the Commission shall be included in the lump sum payment under section 5551 or 5552(1) of this title but may not be retained to the credit of the employee under section 5552(2) of this title.

(e) Annual leave otherwise accruable after June 30, 1960, which is lost by operation of this section because of administrative error and which is not credited under subsection (d)(2) of this section because the employee is separated before the error is discovered, is subject to credit and liquidation by lump sum payment only if a claim therefor is filed within 3 years immediately following the date of discovery of the error. Payment shall be made by the agency of employment when the lump sum payment provisions of section 5551 of this title last became applicable to the employee at the salary rate in effect on the date of the lump sum provisions became applicable. As amended Pub.L. 93-181, §3, Dec. 14, 1973, 87 Stat. 705.

PUBLIC LAW 93-181
93rd Congress, H. R. 1284
December 14, 1973

AN ACT

To amend title 5, United States Code, to improve the administration of the leave system for Federal employees.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) the second sentence of section 5551 (a) of title 5,United States Code, is amended by striking out ", except that it may not exceed pay for a period of annual or vacation leave in excess of 30 days or the number of days carried over to his credit at the beginning of the leave year in which entitlement to payment occurs, whichever is greater".

(b) Section 5551(b) of title 5, United States Code, is amended to read as follows:

"(b) The accumulated and current accrued annual leave to which an officer excepted from subchapter I of chapter 63 of this title by section 6301(2) (x)-(xii) of this title, is entitled immediately before the date he is excepted under that section shall be liquidated by a lump sum payment in accordance with subsection (a) of this section or subchapter VIII of this chapter, except that the payment is based on the rate of pay which he was receiving immediately before the date on which section 6301(2)(x)-(xii) of this title became applicable to him.".

Sec. 2. The first sentence of section 6303(b) of title 5, United States Code, is amended to read as follows: "Notwithstanding subsection (a) of this section, am employee

whose current employment is limited to less than 90 days is entitled to annual leave under this subchapter only after being currently employed for a continuous period of 90 days under successive appointments without a break in service.".

Sec. 3. Section 6304 of title 5, United States Code is amended --

(1) by striking out of subsection (a) the phrase "subsection (b) of this section" and inserting in lieu thereof "subsections (b), (d), and (e) of this section"; and

(2) by adding at the end thereof the following new subsections: "(d)(1) Annual leave which is lost by operation of this section because of --

"(A) administrative error when the error causes a loss of annual leave otherwise accruable after June 30, 1960;

"(B) exigencies of the public business when the annual leave was schedule in advance; shall be restored to the employee.

"(2) Annual leave restored under paragraph (1) of this subsection, or under clause (2) of section 5562(a) of this title, which is in excess of the maximum leave accumulation permitted by law shall be credited to a separate leave account for the employee and shall be available for use by the employee within the time limites prescribed by regulations of the Civil Service Commission. Leave credited under this paragraph but unused and still available to the employee under the regulations prescribed by the Commission shall be included in the lump sum payment under section 5551 or 5552(1) of this title but may not be retained to the credit of the employee under section 5552(2) of this title.

"(e) Annual leave otherwise accruable after June 30, 1960, which is lost by operation of this section because of administrative error and which is not credited under subsection (d) (2) of this section because the employee is separated before the error is discovered, is subject to credit and liquidation by lump sum payment only if a claim therefor is filed within 3 years immediately following the date of discovery of the error. Payment shall be made by the agency of employment when the lump sum payment provisions of section 5551 of this title last became applicable to the employee at the salary rate in effect on the date of the lump-sum provisions became applicable.".

Sec. 4. Section 6302 of title 5, United States Code, is amended by inserting at the end thereof the following new subsection:

"(f) An employee who uses excess annual leave credited because of administrative error may elect to refund the amount received for the days of excess leave by lump-sum or installment payments or to have the excess leave carried forward as a charge against later-accruing annual leave, unless repayment is waived under section 5584 of this title.".

Sec. 5. With respect to a former employee (except a former employee under section 6 of this Act) who is not on the rolls on the date of enactment of this Act, annual leave which accrued after June 30, 1960, but, because of administrative error, was lost by operation of section 6304 of title 5, United States Code, is subject to credit and liquidation by lump-sun payment only if a claim therefor is filed within three years immediately following the date of enactment of this Act, with the agency by which he was employed when the lump-sum payment provisions of section 5551 of title 5,

United States Code, last became applicable to him. Payment shall be by that agency at the salary rate in effect on the date the lump-sum payment provisions became applicable.

Sec. 6. (a) With respect to a former employee of the Post Office Department or a former employee of the United States Postal Service who had prior civilian service with the Post Office Department or other Federal Agency, who is not on the rolls on the date of enactment of this Act, annual leave which accrued after June 30, 1960, and before July 1, 1971, but, because of administrative error was lost by operation of section 6304 of title 5, United States Code, is subject to credit and liquidation by lump-sum payment only if a claim therefor is filed within three years immediately following the date of enactment of this Act with the Postal Service. Payment shall be by the Postal Service at the salary rate in effect on the date the lump-sum payment provisions of section 5551 of title 5, United States Code, or comparable provisions of regulations of the Postal Service, as appropriate, last became applicable to the former employee.

(b) With respect to a present employee of the Postal Service who had prior Federal civilian service with the Post Office Department or other Federal agency annual leave which accrued after June 30, 1960, and before July 1, 1971, but, because of administrative error was lost by operation of section 6304 of title 5, United States Code, is subject to credit and liquidation by lump-sum payment only if a claim therefor is filed within three years immediately following the date of enactment of this Act with the Postal Service. Payment shall be by the Postal Service at the salary rate in effect on the date of enactment of this Act.

Sec. 7. (a) Section 5562(a) of title 5, United States Code, is amended by adding at the end thereof the following new sentences: "Notwithstanding any other provision of law, an employee in a missing status on or after January 1, 1965, is entitled --

"(1) to payment for annual leave which accrued to his account on or after January 1, 1965, but which was forfeited under section 6304 of this title because he was unable to use that leave by virtue of his missing status; or

"(2) to have all of that leave restored to him and credited to a separate leave account in accordance with the provisions of section 6304(d)(2) of this title.

An employee shall elect in writing, within 90 days immediately following the date of enactment of this sentence or within 90 days immediately following the termination of his missing status, whichever is later, whether he desires payment for the leave under clause (1) of this subsection or credit of the leave under clause (2) of this subsection. Payment under clause (1) of this subsection shall be at the employee's rate of basic pay in effect at the time the leave was forfeited."

(b) The amendment made by subsection (a) of this section shall apply to former employees or their beneficiaries.

Approved December 14, 1973.

C E R T I F I C A T E

I hereby certify that three copies of the aforegoing Petition for Writ of Certiorari have been sent first class mail, postage prepaid and properly addressed tc each of the following persons or organizations:

(1) Mr. Leonard P. Avery
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Washington, D. C. 20530

this _____day of _____, 1974

_____

In the Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-700

THOMAS A. MOTTO, JR., PETITIONER

v.

THE GENERAL SERVICES ADMINISTRATION OF THE UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

The Back Pay Act provides that a reinstated employee is entitled to the pay and allowances that he normally would have earned had he not been wrongfully discharged, "except that the employee may not be credited * * * leave in an amount that would cause the amount of leave to his credit to exceed the maximum amount of the leave authorized for the employee by law or regulation" (5 U.S.C. 5596(b)). Petitioner contends that the court of appeals erred in not ordering that he be paid the monetary equivalent of the leave he would have accrued beyond the maximum amount of leave authorized.

On February 12, 1967, petitioner was discharged from his employment with the General Services Administration. The district court found that the discharge was wrongful, and it ordered petitioner reinstated with back pay (Pet. App. 4-5). At the time of his discharge petitioner had been paid $950.40 as a lump sum payment for 240 hours of accumulated leave. Upon reinstatement, the $950.40 was deducted from the court's award and petitioner was recredited with 240 hours of accumulated leave, plus the annual leave accrued during the then current year *(id.* at 14-15). Petitioner moved the district court to amend its judgment so as to require that petitioner be permitted to retain the $950.40 and be paid the monetary value of the additional leave he would have earned during the period of separation *(id.* at 16). The district court denied the motion *(id.* at 16-19), and the court of appeals affirmed *(id.* at 1).

Petitioner contends that the Back Pay Act authorizes payment to him of the monetary equivalent of earned leave beyond the leave that he can lawfully accrue, and that it authorizes as well his retention of the lump sum payment made upon his discharge. The contentions are without merit and have consistently been rejected. See *Ainsworth* v. *United States,* 399 F. 2d 176, 183-185 (Ct. Cl.), and cases cited therein. As the Court of Claims explained in *Ainsworth,* had petitioner continued in government service, he would not have received the monetary equivalent of his annual leave, and there is no basis in the Back Pay Act for converting accumulated hours of annual leave into a monetary equivalent. Deduction of the previously received lump sum payment was also proper, because petitioner would not have received that payment if he had not been discharged. When he was restored to his position, his right to the lump sum payment no longer existed.

Ainsworth is dispositive of petitioner's contentions. That case was properly relied upon by the district court here, and the court of appeals' affirmance was correct.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1975.